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UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

FRANKLIN JAY SCOTT, JR., a Minor, and NICHOLAS THOMAS, a Minor,
Plaintiffs-Appellants,

v.

SCHOOL BOARD OF ALACHUA COUNTY,
Defendant-Appellee.

No. 02-14931

Non-Argument Calendar

Filed March 20, 2003

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT, BIRCH and RONEY, Circuit Judges.

PER CURIAM:

Plaintiffs Franklin Jay Scott, Jr. and Nicholas Thomas ("Plaintiffs"), then both Santa Fe High School students, filed a 42 U.S.C. § 1983 lawsuit against defendant School Board of Alachua County ("School Board"), alleging that the discipline imposed by Principal Lamar Simmons--school suspensions--for their displaying of a Confederate flag on school premises, after previously being told not to do so, violated their First Amendment right to symbolic

speech. The district court granted the School Board's motion for summary judgment.

Plaintiffs appeal asserting three arguments. They first argue that their school suspensions were based on an inadequate showing of a material and substantial disruption and thus violated the Court's decision in *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Next, plaintiffs argue that the School Board's "after-the-fact justifications" for Principal Simmons' unwritten ban of Confederate flags were pretextual and thus expose the School Board to monetary liability. Third, plaintiffs assert that genuine issues of material fact exist as to whether: (1) the School Board was aware or was deliberately indifferent to Principal Simmons' unwritten ban of Confederate flags and (2) the racial impact of a prior disruption in the high school was adequate to precipitate Principal Simmons' unwritten ban.

After careful review of the briefs, record, and relevant case law, we affirm the decision of the district court, holding that Principal Simmons' unwritten ban of Confederate flags on school grounds was not an unconstitutional restriction of the plaintiffs' First Amendment rights. As such, there is no actionable § 1983 claim in this case. Having decided that, we need not consider whether the Board was aware or was deliberately indifferent to Principal Simmons' unwritten ban of Confederate flags.

Prior to setting forth the applicable portions of the district court's well-reasoned opinion, we note that

this First Amendment freedom of expression case stands against the unique backdrop of a public school. Although public school students' First Amendment rights are not forfeited at the school door, those rights should not interfere with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve. Short of a constitutional violation based on a school administrator's unsubstantiated infringement on a student's speech or other expressions, this Court will not interfere with the administration of a school.

The district court properly determined that Principal Simmons' unwritten ban on displaying the Confederate flag was not a violation of the plaintiffs' First Amendment rights. The applicable portions of the Order of District Judge Maurice M. Paul giving the reasons for this decision, which we accept, are as follows:

> Simply put, the defendant's second argument is that the ban on Confederate symbols was appropriate based on the potential disruption that the displaying of Confederate symbols would likely create. After a careful analysis of *Denno v. School Bd. of Volusia County,* 218 F.3d 1267 (11th Cir. 2000), *Tinker v. Des Moines Independent Comm. School Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L. Ed. 2d 731 (1969) and *Bethel School District v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 972 L. Ed. 2d 549

(1986), the Court concludes that school officials can appropriately censure students' speech under either of the following two theories. First, from the *Tinker* case, school officials are on their most solid footing when they reasonably fear that certain speech is likely to "appreciably disrupt the appropriate discipline in the school." *Denno*, 218 F.3d at 1271, citing *Tinker*, 393 U.S. at 514, 89 S.Ct. 733. Second, from *Fraser*, even if disruption is not immediately likely, school officials are charged with the duty to "inculcate the habits and manners of civility as values conducive both to happiness and to the practice of self-government." To do so, they must have the flexibility to control the tenor and contours of student speech within school walls or on school property, even if such speech does not result in a reasonable fear of immediate disruption. *Denno*, 218 F.3d at 1271. As the Supreme Court stated in *Fraser*:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive

> or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." *Tinker*, 393 U.S. at 508, 89 S.Ct. at 737.... The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board. The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers--and indeed the older students--demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. [478 U.S.] at 683, 106 S.Ct. at 3164.

In the case sub judice, however, the above language merely begs the question. The real difference of opinion in this case, of course, is whether the symbol should be considered "vulgar and offensive" at all. That is, some say the symbol is not offensive if not intended to be offensive. Others say it is innately offensive,

while still others argue that, even if the symbol is not intended to be offensive or innately offensive, it is still dangerous because it is perceived as offensive by so many people.

This debate, which is being played out in state legislatures, newspaper editorial columns and classrooms across the South is exemplified in the expert witness disclosures offered by the two sides in this case. The plaintiffs' experts plan to testify that "the Confederate Battle flag is not a symbol of racism, but rather a historical symbol embodying the philosophical and political principals of a decentralized form of government in which states and local government retain all powers not expressly ceded to the centralized federal government under the constitution" and that thus the flag is merely "a symbol of southern heritage." (Disclosure of proposed expert Marshall DeRosa, PhD, doc. 19). The defendant's expert plans to testify that "from its inception, the confederacy was a political movement dedicated to the preservation of the institution of slavery. Therefore from its inception, the confederacy and its symbols represented approval of white supremacy" and that "the confederate flag is a symbol that has acquired numerous racist associations to the point that the flag itself has understandably come to be perceived as a racist symbol." (Disclosure of proposed expert Fitz Brundage, PhD, doc. 24).

The problem, of course, is that both of them are correct. And they are correct not only in describing the different emotions this symbol evokes, but also in connoting the depth of those emotions through their choice of words. Words like "symbol", "heritage", "racism", "power", "slavery", and "white supremacy" are highly emotionally charged and reveal that for

many, perhaps most, this is not merely an intellectual discourse. Real feelings--strong feelings--are involved. It is not only constitutionally allowable for school officials to closely contour the range of expression children are permitted regarding such volatile issues, it is their duty to do so. The Court thus agrees with *Denno* in its approval of the following language from the United States District Court in Kansas:

> Part of a public school's essential mission must be to teach students of differing races, creeds and colors to engage each other in civil terms rather than in "terms of debate highly offensive or highly threatening to others."... There is no evidence that the school district has attempted to suppress civil debate on racial matters, but the district had concluded that the display of certain symbols that have become associated with racial prejudice are so likely to provoke feelings of hatred and ill will in others that they are in appropriate in the school context.

Denno, 218 F.3d at 1273, citing *West v. Derby Unified School Dist. No. 260*, 23 F. Supp. 2d 1223, 1233-34 (D.Kan.1998), *aff'd*, 206 F.3d 1358 (10th Cir.2000)(quoting *Fraser*, 478 U.S. at 683, 106 S.Ct. 3159).

In light of the above principles, the Court finds that the ban on the display of Confederate symbols was not unconstitutional. School officials presented evidence of racial tensions existing at the school and provided testimony regarding fights which appeared to be racially based in the months leading up to the actions underlying this case. Additionally, one only needs to consult the evening news to understand the concern school administrators had regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provoke. Therefore, under both *Tinker* and *Fraser*, the school administrators did nothing wrong in banning the display of Confederate flags on school property.

In light of the plaintiffs' constitutional rights by banning the display of Confederate flags on school grounds and subsequently enforcing the ban by suspending them. Having found no constitutional right violated, the plaintiffs have failed to set forth a prima facie case for § 1983 relief. The district court properly granted the defendant's motion for summary judgment.

AFFIRMED

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[1] Pursuant to the Joint Stipulation as doc. 69, the students themselves have been substituted as plaintiffs in place of their guardians who were the originally named plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

FRANKLIN SCOTT, and
NICHOLAS THOMAS,

Plaintiffs,

vs. **CASE NO. 1:01cv29 MMP**

ALACHUA COUNTY SCHOOL BOARD,

Defendants,

Filed August 7, 2002

ORDER

This matter is before the Court on the motions for summary judgment filed by both sides in this case. (docs. 30 and 34). For the reasons which follow summary judgment is granted in favor of the defendant.

This case involves two students[1] who were punished by Santa Fe High School administrators for displaying the Confederate Battle flag at school after being told not to do so. One student was suspended and the other was suspended and had his zoning exemption revoked. Plaintiffs produced evidence that

prior to October 2000, at least four students had been told not to wear the Confederate Battle flag to school, and that Dean Loretta Shane acknowledged the existence of a rule at Santa Fe High School banning the display of the battle flag because it "offended certain people." In September of 2000, Mr. Scott displayed a battle flag on his vehicle and was told not to do so by Dean Shane. A month later, he rode into the school parking lot with the battle flag on his vehicle's antenna but immediately removed it once he parked. Nevertheless, he was suspended by the school for displaying the battle flag on school campus. His zoning exemption was also revoked, causing him to have to change schools the following year. Mr. Thomas wore a shirt to school in September of 2000 which contained the Confederate Battle flag and was given in-school suspension and told not to wear it on campus. In October of 2000, he wore the shirt again and was given another stint of in-school suspension.

The two students sued, seeking a declaration that students possess the constitutional right to display the Confederate Battle flag and that the school's ban on display of the battle flag is unconstitutional. Additionally, the students asserted a claim for injunctive relief and damages under 42 U.S.C. § 1983.

The defendant moved for summary judgment under two theories. First, defendant relies on *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 663 (1978), to claim that the School Board did not have a formal policy banning the display of the battle flag, that the school administrators were not final policymakers regarding the display of the battle flag,

and that the ban on the battle flag was not so widespread and pervasive as to rise to the level of a school board policy. Without one of those three factors being present, the actions of the school administrators cannot be the basis of liability for the school board. *Id.*

The Court agrees that there is no evidence of a promulgated school board policy covering the display of Confederate Battle flags. Additionally, as in *Denno v. School Bd. of Volusia County, Fla.*, 218 F 3d 1267 (11th Cir. 2000), the school administrators in this case were not final policymakers because their decisions were subject to meaningful administrative review. See School Board of Alachua County Code of Student Conduct for Secondary Schools, 2001-02. Moreover, as in *Denno*, administrators at a single school out of the forty-five schools in Alachua County cannot logically be said to set final policy for the whole county. Finally, although the plaintiffs have shown several instances of the implementation of the ban at Santa Fe High School, they have not provided evidence that different schools were enforcing such a ban throughout the district and that the School Board was aware of it or were deliberately indifferent to it. Thus, the ban was not so widespread and pervasive as to the rise to the level of a school board policy.

Because of the above facts, defendant argues that § 1983 liability cannot be imposed on the school board. However, the Eleventh Circuit has held that a municipality's failure to correct the constitutionally offensive actions of its employees can rise to the level of a custom or policy "if the municipality tacitly authorizes these actions or displays deliberate

indifference" towards the misconduct *Brooks v. Scheib*, 813 F.2d 1191, 1193 (11th Cir. 1987). In the instant case, the School Board has gone further than "tacitly authorizing" the actions. In the stipulations filed at doc. 49, the School Board states that while it has not officially adopted a district-wide Confederate flag policy, "[t]he School Board of Alachua County is fully aware of and approves of Principal Simmons' decision to prohibit the display of Confederate Flags and symbols at Santa Fe High School." (doc. 49, ¶ 2).

The Court finds that this after-the-fact ratification of the principal's decision is enough to support the plaintiffs' claims for forward-looking injunctive relief under 42 U.S.C. § 1983. However, because the plaintiffs can offer no evidence that the school board knew of the ban or even tacitly supported the ban at the time of the actions underlying this case, the Court finds no basis for imposing monetary damages under *Monell* against the school board. Thus, summary judgment is granted for the defendant with regard to the compensatory damages claim under § 1983, and the Court must turn to defendant's second argument with regard to the injunctive and declaratory claims.

Simply put, the defendant's second argument is that the ban on Confederate symbols was appropriate based on the potential disruption that the displaying of Confederate symbols would likely create. After a careful analysis of *Denno v. School Bd. of Volusia County*, 218 F.3d 1267 (11th Cir. 2000), *Tinker v. Des Moines Independent Comm. School Dist.*, 393 U.S. 503 (1969) and *Bethel School District v. Fraser*, 478 U.S. 675 (1986), the

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In light of the above principles, the court finds that the ban on the display of confederate symbols was not unconstitutional. School officials presented evidence of racial tensions existing at the school and provided testimony regarding fights which appeared to be racially based in the months leading up to the actions underlying this case. Additionally, one only needs to consult the evening news to understand the concern school administrators had regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provoke. Therefore, under

both *Tinker* and *Frazer,* the school administrators did nothing wrong in banning the display of Confederate flags on school property.

Accordingly it is hereby

ORDERED AND ADJUDGED:

1. The defendant's motion for summary judgment (doc. 30) is GRANTED and the plaintiffs' motion for summary judgment (Doc.34) is denied.

2. The Clerk shall enter judgment for the defendant on all claims, and all other motions should be terminated.

DONE AND ORDERED this 7th day of August, 2002

/S/
Maurice M. Paul, Senior District Judge